CFTC letter No. 03-18
April 4, 2003
No-Action
Division of Clearing and Intermediary Oversight

Re: Section 4m(1) – Request for CPO and CTA registration no-action positions Rule 4.14(a)(8) – Request for confirmation of eligibility

Dear :

This is in response to your letter dated August 13, 2002, to the Division of Clearing and Intermediary Oversight (the "Division")[1] of the Commodity Futures Trading Commission (the "Commission"), as supplemented by the e-mail messages dated October 4, December 9, December 11, 2002, and January 10, January 22, January 30 and February 7, 2003 and facsimile transmission dated January 14, 2003 from "A" of your firm, and by telephone conversations with Division staff. By your correspondence, you request relief on behalf of "R", "S", "T", and the U.S. persons[2] (collectively, the "U.S. Directors") who are directors of "U", a _____ investment company (the "U")[3] or directors of certain "V" investment companies (the "V Funds"), in connection with advising and operating the "U", the "V" Funds and certain European pension plans (the "Pension Plans,"[4] collectively referred to herein with the "U" and the "V" Funds as the "Managed Accounts").[5]

Specifically, you request that the Division: (1) will not recommend that the Commission commence any enforcement action against "R" for failure to register as a commodity pool operator ("CPO") or as a commodity trading advisor ("CTA") under Section 4m(1)[6] of the Commodity Exchange Act (the "Act"); (2) will not recommend that the Commission commence any enforcement action against either "S" or "T" for failure to register as a CTA under Section 4m(1) of the Act; (3) will not recommend that the Commission commence any enforcement action against any of the U.S. Directors for failure to register as a CPO under Section 4m(1) of the Act; and (4) confirm that any relief granted by the Division not preclude "R" from claiming, or "T" or "S" from continuing to claim, the CTA registration exemption provided by Rule 4.14(a)(8).

Based upon the representations made in your correspondence, we understand the facts to be as follows. "R" is a United Kingdom investment adviser that has applied for registration with the Securities and Exchange Commission ("SEC") as an investment adviser. "T" and "S" are each registered with the SEC as investment advisers, each has a principal place of business in the United States, and each has claimed exemption from CTA registration under Rule 4.14(a)(8).[7] "R" has entered into subadvisory agreements with "T" and "S" to provide investment advisory, marketing and client servicing functions to the Managed Accounts.[8] Through this structure, "R", "T" and "S" currently provide securities advice to the "U" and several "V" Funds and Pension Plans. In the future, "T" and "S" wish to provide

commodity interest trading advice to these Managed Accounts. Such advice would be solely incidental to providing securities trading advice to the Managed Accounts, and would be consistent with the requirements of Rule 4.5(c)(2).[9]

"R's" activities with respect to the "U" and the "V" funds go beyond providing trading advice. In addition to appointing "T" and "S" to advise these funds, "R" is primarily responsible for soliciting, and marketing to, investors in the "U". "R" has extensive investor contact in connection with these activities and serves as the primary contact for investors in the "U".[10] "R" may also engage in these activities on behalf of the "V" Funds, but its primary activity with respect to those entities is the provision of investment management services through "T" and "S".

While the "U" is organized under the laws of _____, three of its four directors are U.S. Directors and the same individuals are also directors of "R". The "V" Funds are organized under the laws of _____,[11] and the Pension Plans are established under the laws of various _____ _____ countries.

Neither "R", nor any of the Managed Accounts, was (or will be) organized outside the United States for the purpose of avoiding registration requirements under the Act. None of the directors or officers of "R", "T", "S" or the Managed Accounts is subject to a statutory disqualification under Section 8a(2) or 8(a)(3) of the Act.[12] The same will be true for the directors of the "V" Funds and the trustees of the Pension Plans.

In support of a CPO registration no-action position for "R" and the U.S. Directors, you further represent that: (1) beneficial interests in the Managed Accounts will be offered and sold exclusively to Non-United States Persons;[13] (2) only Non-United States Persons will participate, directly or indirectly, in the Managed Accounts; (3) no funds or other capital will be contributed to the Managed Accounts, directly or indirectly, from U.S persons; (4) no person affiliated with the Managed Accounts has undertaken or will undertake any marketing activity for the purpose of, or that could reasonably have the effect of, soliciting participation from U.S. persons; and (5) no marketing activities in connection with the Managed Accounts will be conducted from the United States.

In support of CTA registration no-action positions for "R", "T" and "S" you further represent that: (1) the provision of commodity interest trading advice by "T", "T" and "S" to the Managed Accounts will be solely incidental to the provision of securities trading advice to the Managed Accounts; (2) "R", "T" and "S" will provide commodity interest trading advice to the Managed Accounts in a manner consistent with eligibility status under Rule 4.5; (3) neither "R", "T" nor "S" will otherwise hold itself out as a CTA; and (4) with the exception that the none of the Managed Accounts is a qualifying entity under Rule 4.5 for which a notice of eligibility has been filed or an entity excluded from the definition of "pool" under Rule 4.5 (and in the case of "R", that its registration with the SEC as an investment adviser is currently pending), "R", "T" and "S" will otherwise meet the criteria of Rule 4.14(a)(8).

Based upon the representations made in your correspondence and consistent with prior practice,[14] the

Division will not recommend that the Commission commence any enforcement action: (1) against "R" or any of the U.S. Directors based solely upon failure to register as a CPO under Section 4m(1) of the Act in connection with the operation of the Managed Accounts; or (2) against "R", "T" or "S" based solely upon the failure of "R", "T" or "S" to register as a CTA under Section 4m(1) of the Act in connection with providing commodity interest trading advice and other services to the Managed Accounts in the manner described. Moreover, the Division does not believe that the CTA registration no-action position taken herein should, in itself, render "R", "T" or "S" ineligible to claim exemption from CTA registration under Rule 4.14(a)(8) in a situation in which each would meet all of the criteria for exemption under Rule 4.14(a)(8)[15] but for the fact that it was advising the Managed Accounts pursuant to this letter.[16] This latter position is conditioned, in the case of "R", upon effectiveness of its pending registration with the SEC as an investment adviser.

The no-action positions taken in this letter do not excuse "R", "T", "S" or the U.S. Directors from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, each remains subject to all antifraud provisions of the Act [17] and the Commission's regulations, to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations, and to all applicable provisions of Part 4.

This letter, and the no-action positions taken herein, are based upon the representations made to us. Any different, changed or omitted material facts or circumstances might render these positions void. You must notify the Division immediately in the event that the operations or activities of "R", "T", "S", the Managed Accounts or the U.S. Directors change in any respect from those as represented to us. Further, this letter and the positions taken herein represent the views of this Division only and do not necessarily represent the views of the Commission or of any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact me or Christopher W. Cummings, Special Counsel, at (202) 418-5445.

Very truly yours

Jane Kang Thorpe
Director

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[1] As of July 1, 2002, a reorganization of Commission staff became effective. Accordingly, for purposes of this letter, the term "Division" includes the Division of Clearing and Intermediary Oversight and its predecessor, the Division of Trading and Markets, as the context requires.

[2] For the purpose of this letter, the term "U.S. person" means a person who is not a Non-United States person as defined in Commission Rule 4.7(a)(1)(iv). Commission rules referred to herein are found at 17

C.F.R. Ch. I (2002).

[3] The "U" is organized under the laws of _____ as a _____.

[4] In "A's" February 7, 2003 e-mail message, you withdrew that portion of your request that originally sought CPO registration relief for the trustees of the Pension Plans, because no trustee will be a U.S. person, participants in the Pension Plans will be "Non-United States persons" as defined in Rule 4.7, and no entity affiliated with "R" (or any officer or employee of such an affiliate) will serve as the trustee of a Pension Plan or in any manner provide any services to a Pension Plan other than the advisory services described in your correspondence.

[5] Of the Managed Accounts, the "U" is the only entity with respect to which a decision has been made to provide commodity interest trading advice. To date, "R" has not determined which of the "V" Funds or the Pension Plans will trade commodity interests. Accordingly, you seek relief prospectively with regard to the operation and advising of the "V" Funds and the Pension Plans.

[6] 7 U.S.C. § 6m(1) (2000).

[7] "T" filed its notice of exemption in 1989 under the name of a predecessor entity, "W". "T" is in the process of amending its filing. "S" filed its notice of exemption in 1987.

[8] "R", "T" and "S" are ultimately owned by the same publicly-traded holding company, "X".

[9] The Division notes that subsequent to receiving your request, the Commission proposed amendments to Rule 4.5 (*See* 68 Fed. Reg. 12622 (March 17, 2003)). If adopted, the proposed amendments would remove the trading restrictions of current Rule 4.5(c)(2). Upon adoption of final rules by the Commission, references to Rule 4.5 should be understood to reflect any changes made by those final rules.

[10] In addition, "R" and the "U" have the same directors.

[11] The "V" Funds are not sponsored or organized by "R" or any of its affiliates, nor is any director of a "V" Fund an employee or director of "R" or any of its affiliates.

[12] 7 U.S.C. § 12a(2) or 12(a)(3) (2000).

[13] While "T", "S" and other companies affiliated with "R" may contribute seed capital to the "U" and/or the "V" Funds, the Division does not believe that these contributions constitute participation by U.S.

persons. *See*, *e.g.*, CFTC Staff Letter 85-18 [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,786 (October 16, 1985); and CFTC Staff Letter 00-95 [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,287 (October 3, 2000).

[14] *See*, *e.g.*, CFTC Staff Letter 00-95 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,287 (October 3, 2000); CFTC Staff Letter 00-96 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,288 (October 4, 2000); and CFTC Staff Letter 00-61 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,141 (May 12, 2000). In each case, CTA registration not required where the adviser was a registered investment adviser advising a non-U.S. investment fund in accordance with the requirements of Rule 4.14(a)(8) except that the advised funds were neither qualifying entities under Rule 4.5 for which a notice of eligibility had been filed nor entities excluded from the definition of "pool" under Rule 4.5. In Staff Letter 00-96, CPO registration was not required for a Luxembourg management company of a Luxembourg investment fund, where the management company was owned by U.S. persons and had U.S. person directors, but the fund was marketed, offered and sold exclusively to Non-U.S. Persons.

[15] The Division notes that subsequent to receiving your request, the Commission also proposed amendments to Rule 4.14(a)(8) (*See* 68 Fed. Reg. 12622). If adopted, the proposed amendments would, among other things, permit CTAs claiming exemption under Rule 4.14(a)(8) to advise pools organized and operated outside the U.S. that accept only Non-U.S. persons as participants. Upon adoption of final rules by the Commission, references to Rule 4.14(a)(8) should be understood to reflect any changes made by those final rules.

[16] *See* CFTC Staff Letter 97-05 [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,972 (February 12, 1997) (no-action position permitting a registered investment adviser advising several companies pursuant to claim of CTA registration exemption under Rule 4.14(a)(8) to also provide commodity interest trading advice to an offshore pool without registering as a CTA).

[17] *See*, *e.g.*, Sections 4b and 4o, 7 U.S.C. §§6b and 6o (2000).